



PLANNING AND BUILDING SERVICES

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DEVELOPMENT AND INFRASTRUCTURE SERVICES/PLANNING & BUILDING SERVICES REPORT 2016-47

TO: Committee of the Whole

SUBJECT: Ontario Municipal Board Review - Analysis
NP-16-47

ORIGIN: Planning and Building Services

RECOMMENDATIONS

THAT Development and Infrastructure Services/Planning & Building Services Report 2016-47 dated November 28, 2016 regarding the Ontario Municipal Board Review - Analysis be received and that the following recommendation(s) be adopted:

1. THAT Council direct staff to submit Report 2016-47 and Information Report 2016-44 to the Province of Ontario as the Town of Newmarket's comments on the Ontario Municipal Board Review.

BACKGROUND

Information Report #2016-44, dated November 2, 2016, provided background information regarding the OMB review process, timelines, statistics of the OMB, and powers of the OMB compared with other jurisdictions, and a summary of the Regional Planning Commissioners of Ontario (RPCO)'s recommendations.

PURPOSE OF THIS REPORT

Building on Information Report #2016-44, this Report provides staff's assessment of three of the most significant issues that are being examined by the province, and provides specific recommendations on each. This Report should be read together with Report #2016-44, which describes many other potential ways that could improve the current OMB system.

COMMENTS

In reviewing the relevant information made available to date, including reviewing the public consultation documents released by the province and RPCO, as well as attending the provincial workshop, and

meetings/discussions with Regional staff, three main issues of concern have emerged regarding the existing OMB process:

1. The OMB's limited resources relative to the high volume of matters that appear before the Board
2. The level of regard the OMB has for the decisions of municipal staff and Councils / *de novo* hearings
3. The litigious nature of the OMB process and effective citizen participation

The remainder of this report will focus on these three issues.

1. The OMB's limited resources relative to the high volume of matters that appear before the Board

As noted in Report # 2016-44, uniquely extensive powers are afforded to the OMB by the Province. This has resulted in the OMB having to process a large number of appeals annually, to a point where existing resources are being overburdened. Currently, the Province is considering ways to address this by:

- Developing a specific list of matters of public interest, the decisions on which would not be appealable.

The RPCO goes further, recommending:

- All municipally led comprehensive and area-wide Official Plans and Official Plan Amendments be exempt from appeal. (Note: this would not affect the province's right to appeal municipal policies, municipal right to appeal provincial decisions, or an individual's right to appeal policies as they relate to *particular lands*. Nor does this affect existing rights of individual's to apply for Official Plan Amendments, however a municipal refusal of such could not be appealed.)
- Scoping the types of matters appealable to the OMB so that only large or complex planning matters appear before the Board. This can be done by removing appeal rights to Committee of Adjustment matters (severances and minor variances) which can be dealt with through separate processes, such as Local Appeal Bodies and/or an "OMB-lite" process.
- More actively promoting mediation and revamping the mediation process so that fewer appeals end up at full hearings.

Note: The reforms being recommended as outlined above build off those provided by Bill 73. As a reminder, Bill 73, which largely came into force on July 1, 2016, limited appeals to the OMB by not allowing whole Plan appeals, restricting appeals on certain matters of provincial interest as set out by the Province, and applying a two-year "timeout" for amendments to new official plans.

Staff's recommendation: That these changes be supported as they would effectively reduce the number of annual hearings and allow the OMB to focus their resources in a more efficient and effective manner. Further, they would help achieve a planning context where appeals to the OMB are exceptional events rather than an expected part of the planning approval process.

2. The level of regard the OMB has for the decisions of municipal staff and Councils / *de novo* hearings

OMB hearings are often criticized because they are heard on a *de novo* basis. *De novo* hearings are hearings that start anew; when matters go before the OMB as though no previous decision has been made. The reason for this criticism is that they largely ignore the decision of a municipal Council and associated rationale.

However, OMB hearings are not truly "*de novo*". The *Planning Act* requires Board members to 'have regard to' the municipal decision and any information and materials that they received in relation to the matter appealed. The problem is that the requirement 'have regard to' is subjective and its implementation varies among Board Members. Therefore, the province is considering a shift away from *de novo* hearings as a way to more deliberately meet this legislative requirement and increase regard for municipal decisions.

A shift away from *de novo* hearings would mean that the role of the OMB is not to seek the 'best' decision, but rather to focus on the validity of the decision under appeal. Unlike with the current model, the decision of the municipality would be central. This might be done by:

- requiring the OMB to review municipal decisions on a standard of reasonableness. That means OMB hearings would examine whether the original decision was within a range of defensible outcomes within the authority of the municipality. If the decision is found to have been made within that range of outcomes, the OMB would not be able to overturn it.
- authorizing the OMB to overturn a decision made by a municipality only if that decision does not follow local or provincial policies. This would mean that the Board would have to be convinced that the planning decision under appeal is contrary to local or provincial policies (eg. approval of development in a flood prone area or a provincially significant wetland, or an official plan that does not meet the Growth Plan for the Greater Golden Horseshoe intensification targets).

Staff's recommendation: That these changes be supported as they would appropriately increase the OMB's regard for the decisions of municipal Councils, and increase the importance of local perspectives in the approval process.

3. The litigious nature of the OMB process and effective citizen participation

The OMB environment is quite litigious in nature. It looks and feels similar to a formal courtroom setting, with lawyers examining and cross-examining expert witnesses. This context can be overwhelming to those who are unfamiliar with it. In addition, significant costs are associated with retaining lawyers and expert witnesses (planners, ecologists, heritage experts, etc). This has the unintended effect of favouring those parties having the wherewithal to understand the formal system and financial resources to retain such experts.

The province is examining the following ways to make OMB procedures more citizen-friendly:

- expanding the Citizen Liaison Office (CLO) at the OMB to help the public understand what the OMB does and how to participate in the process.
- establishing funding tools to help citizens retain their own planning experts and/or lawyers.

Staff's recommendation: That these changes be supported as a means to ensure that citizens can participate in the OMB appeal process in a meaningful way. However, it is cautioned that funding tools be allocated through third parties, funding not be distributed in ways that favour one party over another, and such tools not financially burden municipalities. A thorough procedure must be created to regulate these tools.

REGION OF YORK REPORT

York Region is preparing a joint Report with local municipal input regarding the OMB Review, and will be circulating a draft on November 23, with a deadline for municipal comment on November 29. This Report will then be presented to Regional Council on December 15 with a recommendation to submit to the Province by their December 19 deadline.

This Regional Report will attempt to provide a consensus among local municipalities regarding recommended OMB reforms, and is intended to be signed by all local level planning Directors and Commissioners. The Regional Report will state that local municipalities may also elect to submit their own comments directly to the province.

COMMUNITY CONSULTATION

As part of the public consultation process for the OMB Review, the Province has organized numerous Town Hall Meetings throughout the Province between October 18 and November 24, 2016. One of these meetings was held in Newmarket during the evening of October 18, which was well attended.

In addition, the Province has set up a website for the OMB Review, providing in-depth project information and the consultation paper for public review and comment: <http://www.mah.gov.on.ca/Page14965.aspx>. The deadline for comments to the province is December 19, 2016.

HUMAN RESOURCE CONSIDERATIONS

There are no human resource considerations resulting from this Report.

BUDGET IMPACT

There are no budget impacts resulting from this Report.

BUSINESS PLAN AND STRATEGIC PLAN LINKAGES

Well-respected:

- Being an influential contributor to regional and provincial affairs.

CONTACT

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